No. 88-979

(3)

FEB 14 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all others similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Petitioners,

vs.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DE PERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI, VICTOR OLIVADOTTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE", the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint,

Respondents.

PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents in their brief do not deny that their actions constitute a breach of trust which rebounds to the detriment of the participants in denying to them the benefits $7 million per year would purchase. Their position is excerpted from the decision by the United States Court of Appeals to the effect that obedience to a state court order insulates a fiduciary from claims of breach of duty (Respondents' Memorandum, p. 5). Respondents ignore that in the judicial proceedings resulting in the state court order directing a merger of pension funds and in the litany of litigation commenced by respondents directed toward exculpation from their breach of trust, not once did they plead that the resultant merger was as a result of their lack of fiduciary care or to plead ERISA. As has been cited in the petition for certiorari, this oversight resulted in an unusual comment from the appellate court to the effect that the judgment and order of merger "was entered almost four months after the effective date of ERISA. Certainly defendants [teamster trustees, respondents herein] could have raised the ERISA defenses prior to its entry, but inexplicably failed to do so." Therefore, the trustees hide behind and proffer to the court a judicial sanction for their breach of duty. However, when in control of the litigation, they purposely avoided the very grounds upon which the merger could have been avoided. The respondents now hide behind a court decree wherein they made a conscious choice not to protect their participants but to hide their breach of duty.

RESPONSE TO REASON FOR DENYING THE WRIT

Respondents state that the writ should be denied as "there is no claim that the decision of the Second Circuit conflicts with the decision of another federal court of appeals. . . ." Claiming that no such conflict exists and without a conflict, the Court cannot grant certiorari in a matter totally pre-empted. The

respondents overlook the Ninth Circuit decision in *Sandra Jean Smith v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587 (9th Cir. 1988) (published January 17, 1989). The Ninth Circuit in determining the statutory standard of act or omission, held ERISA jurisdiction for those acts which are discretionary or interpretative of the plan which took place after ERISA's effective date, notwithstanding its genesis prior to ERISA. The merger of these trust funds was inchoate until after ERISA took effect. The merger took place after ERISA's effective date. ERISA, therefore, on its face would be applicable, or, in the alternative, each discretionary or interpretative act took place after ERISA.

The condition precedent to effectuate the merger was not accomplished until after ERISA. If the Court wishes to use the pre-ERISA date of the merger agreement (the contract date), it must disregard its own statements in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 106 S. Ct. 1018, 89 L.Ed.2d 166 (1986):

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

It is submitted that Congress did not justify pre-existing inchoate agreements as a means for justifying a post-ERISA breach of trust. Nor did Congress justify a continuing breach of trust where the experts retained by the trust advised against the continuation of the breach. The teamster trustees have so far been successful in obfuscating the results, in perpetuating their own breach of trust.

CONCLUSION

For the reasons submitted herein and in the petition for the writ, it is respectfully requested that the petition should be granted.

Dated: February 10, 1989

Respectfully submitted,

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